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No. 115

In The Supreme Court Of The United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

vs.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLEES

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INDEX

	Page
INTRODUCTION	1
ARGUMENT — INTRODUCTION	2
THE HISTORY IN OTHER STATES OR IN ARIZONA IS IMMATERIAL	2
ARTICLE 1, SECTION 8, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES DOES NOT BY EXPRESS LANGUAGE OR BY IMPLICATION PREVENT A STATE FROM IMPOSING A NON-DISCRIMINATORY TAX ON A CORPORATE INDIAN TRADER OF THE TYPE IMPOSED HEREIN	3
Commerce with Indians as Commerce with a Tribe	3
The Fact that the Arizona Tax has been Denominated as a Privilege Tax is Immaterial	4
The Protection of Interstate Commerce and Foreign Commerce Rests on a Different Basis than the Protection of Commerce of Indian Tribes	5
NO FEDERAL POLICY OR FEDERAL STATUTE OR RULE OR REGULATION IS AFFECTED BY THE TAX	8
THE STATE HAS NOT ATTEMPTED TO REGULATE INDIAN COMMERCE	10
Congress has not Occupied the Field which the State Seeks to Enter	10
THERE IS NO INTERFERENCE WITH THE INDIAN TRIBES OR THEIR RIGHT OF SELF-GOVERNMENT	13

Page

THE TAX EXEMPTION HEREIN SOUGHT MUST BE CLEARLY EXPRESSED AND NONE CAN BE IMPLIED FROM THE LANGUAGE OF THE CONSTITUTION 14

CONGRESS HAS PROVIDED IN THE BUCK ACT THAT STATE GROSS RECEIPTS TAX MAY BE IMPOSED UPON AN INDIAN TRADER MAKING SALES TO INDIANS WITHIN AN INDIAN RESERVATION 16

CONCLUSION 19

TABLE OF CASES & AUTHORITIES

CASES Page

Alabama v. King & Boozer
314 U.S. 1 10

Arizona State Tax Commission v. Garrett Corporation
79 Ariz. 389, 291 P.2d 208 (1955) 4

British American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S. 159 15

Curry v. United States, 314 U.S. 14 10

Esso Standard Oil Co. v. Evans, 345 U.S. 495 10

General Motors Corporation v. Washington, 377 U.S. 436 12

Graves v. New York, 306 U.S. 466 ..... 10, 11

Huron Portland Cement Co. v. City of Detroit
362 U.S. 440 9

TABLE OF CASES & AUTHORITIES (Continued)

Page

Industrial Uranium Co. v. State Tax Commission
95 Ariz. 130, 387 P.2d 1013 (1963) 4

International Harvester v. Department of the Treasury
322 U.S. 340 ..... 6, 8

J. D. Adams Manufacturing v. Storen, 304 U.S. 307 8

James v. Dravo Contracting Co., 302 U.S. 134 10

Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 13

McGoldrick v. Berwind-White Coal Mining Co.
309 U.S. 33 11

Memphis Steam Laundry Cleaner, Inc. v. Stone
342 U.S. 389 8

Miller v. Arkansas, 352 U.S. 187 ..... 9, 10

New York ex rel Ray v. Martin, 326 U.S. 496 15

Norton Co. v. Department of Revenue, 340 U.S. 534..... 8

Novicki v. Department of Finance
373 Ill. 342, 26 N.E.2d 130 (1940) 8

Oklahoma Tax Commission v. United States, 319 U.S. 598.... 13

Organized Village of Kake v. Egan, 269 U.S. 60..... 10, 12, 15

Pacific States Cast Iron Co. v. State Tax Commission
13 Utah 2d 113, 369 P.2d 123 (1962),
Rev'd. 372 U.S. 605 ..... 6, 8

Page

Richfield Oil Corporation v. State Board of Equalization 329 U.S. 69 ..... 5, 6

Spector Motor Service v. O'Connor, 340 U.S. 602 7

Surplus Trading Co. v. Cook, 218 U.S. 347 15

Thomas v. Gay, 169 U.S. 264 15

United States v. Boyd, 378 U.S. 39 10

United States v. City of Detroit, 355 U.S. 466 10

United States v. McGowan, 302 U.S. 535 14

Williams v. Lee, 358 U.S. 217 ..... 12, 15

CONSTITUTIONAL PROVISIONS

United States Constitution, Art. 1 § 8, cl. 3 ..... 2, 3, 5, 14

United States Constitution, Art. 1, § 10, cl. 2 5

United States Constitution, Art. XIV 18

STATUTES

Page

25 U.S.C. 261 11

54 Stat. 1059, 4 U.S.C. 105 and 106 (Buck Act) 16

54 Stat. 1059, 4 U.S.C. 110 (b) (c) (Buck Act) 16, 18

54 Stat. 1059, 4 U.S.C. (110) (e) (Buck Act).....2, 16, 18

Navajo Tribal Code, Title 5, § 746 (7) 11

ARIZONA REVISED STATUTES

§ 42-1308.A 4

CONGRESSIONAL REPORTS

House Report No. 1267, 76th Congress, 1st Session, Vol. 10301 17

Senate Report No. 1692, 76th Congress, 3rd Session, Vol. 10429 17

CONGRESSIONAL HEARING

Hearing before a Subcommittee of the Committee of Finance of the United States Senate, April 23, 1940, H.R. 6687....17, 18

OTHER MATERIALS

39 Opin. Att. General 518 ..... 18.

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BRIEF FOR THE APPELLEES

INTRODUCTION

The appellees, The Arizona State Tax Commission and Thad M. Moore, Warren Peterson and W. E. Stanford, do not take issue with the preliminary matters raised by appellant. This brief will be therefore confined to the argument raised by the appellant.

ARGUMENT

INTRODUCTION

It is the position of the appellees that the State of Arizona may impose the tax at issue upon Indian traders doing business in the State of Arizona on Indian Reservations within the State. The appellees believe that the tax in question is not a licensing or regulatory statute within any stretch of the imagination; that consequently the State of Arizona is not attempting to regulate Indian traders in contravention of any federal statute or regulation or overriding federal policy. The United States Government in effectuating Article 1, Section 8, Clause 3 of the United States Constitution insofar as Indian Tribes are concerned has not attempted to regulate or say anything whatsoever concerning taxes on Indian traders and therefore has not fully occupied the field. The tax in question in no possible way could be considered an interference with or a burden on, the right of any of the tribes to practice their right of tribal self-government. Further, it is the position of appellees that not only has there been no Congressional interference, but there has been in effect Congressional approval spelled out in 4 U.S.C. 101-111, commonly known and cited herein as the Buck Act. We believe that the language of that law makes it clear that Congress has made taxation imposed on non-Indian persons doing business on the reservation, a matter for state determination.

THE HISTORY IN OTHER STATES OR IN ARIZONA IS IMMATERIAL

It is submitted that the history of prior taxation, or lack of it by states other than Arizona is totally immaterial to a decision in this case. Of necessity it is often a long process before tax administrators or taxpayers decide that the facts or the economics

justify the creation of litigation. If one attempts to explain any delay in the attempt by the State of Arizona, or any other state to collect the taxes it feels due to it, one immediately enters the area of human nature, the enterprise of tax administrators, the favorable or unfavorable personal income tax structures of the taxpayers, the budget problems of both taxpayer and tax administrator, the skill of auditors and perhaps last, but seldom least, politics. The issue or issues which appellant attempts to insert into the case by reason of the history of different taxes in different states or even the history of this tax in Arizona is simply not justicable.

ARTICLE 1, SECTION 8, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES DOES NOT BY EXPRESS LANGUAGE OR BY IMPLICATION PREVENT A STATE FROM IMPOSING A NON-DISCRIMINATORY TAX ON A CORPORATE INDIAN TRADER OF THE TYPE IMPOSED HEREIN

COMMERCE WITH INDIANS AS COMMERCE WITH A TRIBE

A. The appellees do not dispute the broad argument of the appellant to the effect that commerce with an Indian on a reservation constitutes commerce with an Indian Tribe within the meaning of the Constitutional section cited above. That Constitutional clause is a grant of authority to the government of the United States to regulate such commerce and where they have undertaken to regulate it, there is no question concerning their authority to do so. It is submitted, however, that unless and until Congress has actually regulated, by specific statutory enactment, or unless there is interference with tribal self-government or an actual burden on commerce or an interference with it, the state may tax a trader as it taxes all other businesses in the state.

THE FACT THAT THE ARIZONA TAX HAS BEEN DENOMINATED AS A PRIVILEGE TAX IS IMMATERIAL

B. The appellees agree that the statute is self-described as a privilege tax. They also agree that the Supreme Court of the State of Arizona has often characterized it as a privilege tax. But it is a fact that the principal reason for this characterization and the language of the statute is to make crystal clear the fact that it is a tax imposed on the person doing business as opposed to a tax on a person buying retail goods. In other words, the court has gone to great pains to differentiate this type of tax from the sales tax in which the imposition of tax is on the purchaser at retail. For the clearest analysis of this see, *Arizona State Tax Commission v. Garrett Corporation,* 79 Ariz. 389, 291 P.2d 208 (1955).

It is also true that despite this characterization the Supreme Court of the State of Arizona has also stated that it is a tax upon the "privilege or *right* of doing business." (Emphasis supplied). *Arizona State Tax Commission v. Garrett Corporation, supra; Industrial Uranium Co. v. State Tax Commission,* 95 Ariz. 130, 387 P.2d 1013 (1963).

If doing business in Arizona is a "privilege" it is hardly a very valuable one. Any person may have a lifetime right to do business in the State of Arizona for the payment of a fee of $1.00. A.R.S. § 42-1308.A. It would seem just as logical to characterize a state income tax as a tax upon the privilege of receiving an income, and an ad valorem tax upon the privilege of owning a home or other property.

The appellees do not find a Constitutional demand that the tail wag the dog.

THE PROTECTION OF INTERSTATE COMMERCE AND FOREIGN COMMERCE RESTS ON A DIFFERENT BASIS THAN THE PROTECTION OF COMMERCE OF INDIAN TRIBES

C. In the first place this Court has made it abundantly clear that the prohibition against any state taxing imports or exports depends for its validity not upon a constitution of the Commerce Clause, Article 1, Section 8, Clause 3, but upon the clear and undeniable prohibition contained in Article 1, Section 10, Clause 2, generally called the Import-Export Clause which clearly states: "No state shall . . . lay any imposts or duties on imports or exports . . ." The decision by Justice Douglas in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, distinguishes the Commerce Clause in its application to exports and its application to interstate commerce.

> "The two constitutional provisions, while related, are not coterminus. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. Brown v. Maryland, 12 Wheat (U.S.) 419; Crew Levick Co. v. Pennsylvania, 245 U.S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether or not the article was or had ever been, an import or export (citations omitted). Moreover, the Commerce Clause is cast; *not in terms of a prohibition against taxes*, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the state, even in the absence of action by Congress. (citations omitted). But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in McGoldrick v. Berwind-

White Coal Mining Co., supra (309 U.S. p. 48), the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile a competing constitutional demand, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed'." (Emphasis supplied).

The State of Utah was recently faced with the problem arising from an exploration into interstate commerce. In *Pacific States Cast Iron Co. v. State Tax Commission,* 13 Utah 2d 113, 369 P.2d 123 (1962), the question before the court involved the shipment of pipe out of the state immediately following the sale. The majority of the court attempted to read into this problem the language of this Court in *Richfield, supra,* and held that the language of *Richfield* prevented the imposition of any state sales tax. Two judges dissented pointing out with some emphasis the fact that *Richfield,* by its own language, confined itself to imports and exports, citing in part the portion of the decision quoted above. This Court reversed, in effect upholding the position of the dissenting judges and reversed on the authority of one case, *International Harvester v. Department of the Treasury,* 332 U.S. 340. The per curiam decision of this Court is found at 372 U.S. 605. It would appear that the pertinent portions of the *Richfield* decision, *supra,* is to the effect that there is a difference between regulation and taxation. The Court simply stated that where the Constitution prohibits taxation that is, "imposts or duties" the language speaks for itself and nothing more is to be said. But when it speaks of granting Congress the power to regulate, this is not an automatic barrier to state taxation unless it can be shown that the taxation itself by reason of discrimination or other factors contained in the taxing statute actually constitutes a burden on Interstate Commerce. In short the Court has stated that insofar as the Commerce Clause is concerned, the norm that it will consider is the norm of "consituting a burden". It would also consider that norm even in export-import cases if it were not for the flat prohibition against

such taxation contained in another section of the Constitution. This is solid statutory interpretation. When the founding fathers went to the specific area of prohibiting taxation on the part of the states in the field of foreign commerce their meaning is clear. When they did not prohibit taxation in the Commerce Clause, we can only find a prohibition when the taxation itself, by its very nature, interferes with the right of Congress to regulate commerce or when interstate commerce is actually impeded by the taxation imposed by the states. Commerce among the several states is commerce between two geographically separate sovereign jurisdictions, while commerce with the Indian tribes takes place wholly within one sovereign jurisdiction. One is interstate while the other is intrastate where the jurisdictions are concurrent.*

The appellees agree wholeheatedly with the language of Chief Justice Marshall cited in the appellant's brief on page 19. We agree that efforts on the part of states to attempt to interfere with the free flow of commerce would be disastrous to the nation as a whole and would be totally inconsistent with the idea of the federal government even if it were not specifically prohibited by the Constitution. But we also insist; and have to support our insistence citations by this Court too numerous to list, that interstate commerce must pay and can be required to pay its fair share to the states in which a person conducting such business does business. The appellants would, I am sure, admit these general principles of law as they are too well established to be refuted. What they are in essence saying is that because this particular tax is denominated as a privilege tax, that per se it must be either a burden on interstate commerce or an interference with it. This Court has not always so held. While general language to that effect appears in *Spector Motor Service v. O'Connor,* 340 U.S. 602, it would appear on analysis that the language contained therein is too broad to fit the facts of the case and that the dissenting opinion contains a far more logical and convincing analysis of the problem.

This Court in fact has upheld state taxes against a claim of

conflict with the Commerce Clause even where the state taxes in question have been privilege taxes. For example, we have *International Harvester v. Department of the Treasury*, 322 U.S. 340, which held that even though there were incidental interstate attributes to a state transaction the state tax could be properly levied. And the tax in question had been specifically described by this Court as a privilege tax in *J. D. Adams Manufacturing v. Storen*, 304 U.S. 307. *International Harvester, supra*, was dealing with Indiana taxes. However, in 1951, in *Norton Co. v. Department of Revenue*, 340 U.S. 534, an Illinois tax upon certain transactions formed part of an interstate transaction was upheld by this Court and the Illinois tax in qeustion had been specifically described by the Illinois Supreme Court as "A tax not on property, but upon the privilege of engaging in the business of selling . . .". *Novicki v. Department of Finance*, 373 Ill. 342, 26 N.E.2d 130 (1940).

As noted above the *International Harvester* decision was specifically reaffirmed in the past term by this Court in a totally interstate transaction in *Pacific Cast Iron Pipe Co. v. State Tax Commission*, 372 U.S. 605. In short, this Court has upheld taxes even though they have been denominated privelege taxes in the field of interstate commerce if it has found that the taxes are not unduly burdensome, and if it has found that the tax is not discriminatory, i.e. picking out a foreign corporation and taxing it at a higher level than a local business, *e.g. Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389.

NO FEDERAL POLICY OR FEDERAL STATUTE OR RULE OR REGULATION IS AFFECTED BY THE TAX

We agree that the subject of commerce with the Indian tribes is subject to the regulation of the Congress. We agree that if Congress wished it could prohibit the tax in issue. We also agree that even if it did not state such a prohibition specifically, if from the facts it were found that the imposition of such a tax actually

did interfere with the regulatory power of the United States Government that such a tax would have to fall. But plainly and simply there is nothing in the statutes of the United States or in the rules and regulations of the Department of Interior which would imply that a state may not levy a simple tax upon the right of a person to do business within the state. As pointed out above, all the State of Arizona requires is that a person show up with a dollar in hand, and thereafter has a perpetual license to do business anywhere in the state. There is no regulatory aspect whatsoever to the tax and to attempt to insert it is to fly in the face of both the statutes, reality and common sense. Appellant on page 21, lists some speculative dangers in allowing such a tax. Whatever fanciful thing might happen in the future or whatever another state may or may not do, is totally immaterial. There is no prohibition of the sale of any commodity. There is no showing of high moral character or any character indeed. There is no forbidding of any commerce whatsoever. It would be seriously doubtful if the State of Arizona could in fact enact prohibitions of the type suggested by the appellant absent a clear police-power showing. And this Court has recently stated that in a case involving clear and undisputed interstate commerce a reasonable state police power regulation will be upheld even though it does actually interfere with the commerce. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440. This distinction between taxation and regulation is clear and logical on its face and has been supported by this Court in a similar and convincing line of cases. A state may not impose its contractor licensing requirements on an out-of-state contractor working on a federal project. *Miller v. Arkansas,* 352 U.S. 187. This clearly would be an interference with the federal government's right to do business as it pleases and is in conflict with the federal policy to award federal projects to the lowest responsible bidder. The sovereignty of the United States must remain intact. The states recognize it and the decision specifically reaffirms it. On the other hand, however, this Court has consistently and clearly upheld the right of states to impose taxes on contrac-

tors doing business with the United States Government. *James v. Dravo Contracting Co.*, 302 U.S. 134, *Graves v. New York*, 306 U.S. 466; *Alabama v. King and Boozer*, 314 U.S. 1; *United States v. City of Detroit*, 355 U.S. 466; *Curry v. United States*, 314 U.S. 14; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; culminating most recently in *United States v. Boyd*, 378 U.S. 39. And these cases in recent years have been consistent despite the fact it has been shown, argued or admitted that the ultimate economic burden of such taxes may, by contract, have to be borne by the United States Government. The appellant herein reiterates and argues again and again that our statute is a licensing statute. But the tax conidered in *Dravo, supra*, at U.S. 138 was equally as much an annual privilege tax. The licensing provisions of our statute are simply a device to inform the State Tax Commission who is engaged in business and where they are doing business, so that the monthly returns may be provided. To call it regulation is to indulge in complete fancy. Regulation which is to be condemned is that which is noted in the *Miller v. Arkansas* case, *supra*, and not a regulation which states that anyone may have a license by merely asking for it and paying a fee so low as to bring it within the doctrine of de minimis non curat lex.

THE STATE HAS NOT ATTEMPTED TO REGULATE INDIAN COMMERCE, CONGRESS HAS NOT OCCUPIED THE FIELD WHICH THE STATE SEEKS TO ENTER

A. We are not in accord with the appellant's position that the United States has completely or thoroughly regulated or occupied the field of regulation of Indian tribes. For example the law merely states that prices must be reasonable, 25 U.S.C. 261. There has been no attempt to enter the field of price structure, profit or loss, return on original investment or any such matters indicating a desire to occupy the field in the way in which public utilities are regulated. Part of the history of Indian affairs is reported in *Organized Village of Kake v. Egan*, 369 U.S. 60, and the Congres-

sional record shows clearly that the amount of regulation has been steadily diminished through the years. Any regulation goes only so far as Congress has deemed necessary and it has not gone far. But whether it has or not it is the appellee's position that the tax imposed by the laws of the State of Arizona in issue before this Court is not a regulation of any commerce whatsoever. In interstate commerce both the "purchasing and selling" are regulated. Formerly Congress regulated some purchases from Indians, as shown below. But now purchases from Indians are entirely unregulated. Congress has only vested the Department of Interior with regulating sales to Indians. 25 U.S.C. 261.*

We are not saying that taxes are necessarily and always free from attack on the grounds that they do in effect regulate commerce either with Indian tribes or interstate commerce or any thing else. What the appellees do hold is that the fact that the tax is not in and of itself per se regulation. In times past there was authority to the effect that all taxes are regulations of some sort or another. On the basis of that theory it was held that states could not impose an income tax on the income of federal employees, and that similarly the federal government could not impose an income tax on employees of state government. This doctrine has since with met the fate it deserved, complete refuation. *Graves v. New York*, 306 U.S. 466. Similarly as we have pointed out above, the concept that the tax on a person doing business with the government constituted an interference with or a regulation of the right of the government to conduct its own affairs has since gone by the boards. Further, even older concepts that any tax which affected interstate commerce at all must fail has been replaced by a more reasonable and enlightened attitude. A tax even if it does affect interstate commerce can be valid if it does not constitute an undue burden on that commerce or if it does not constitute discrimination against that commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33.

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*Navajo Tribal Code Title 5, Sec. 746(7).

The appellant herein has not claimed that there is an undue burden by virtue of the amount of the tax; he has not claimed that there is discrimination for the fact is that there is none. The appellant is just in the same situation as any other corporate entity in the State of Arizona doing a retail business.

Unfortunately the guidelines which have been laid down for a determination of what burden on interstate commerce is "undue" or not is of little assistance here. For, by its very nature, interstate commerce requires two states and a transaction or way of doing business that has aspects in two different territorial jurisdictions. For instance, this Court has held that a way of doing business which involves only bare solicitation from one state with the order placing, the credit applications, and the manufacturing taking place in another state has been insufficient to provide a taxable basis in the state in which the solicitation took place. Similarly questions of mutliple taxation have given rise to the consideration of the Court, *General Motors Corp. v. Washington,* 377 U.S. 436. But in essence the claim of the appellant does not rest upon a belief or a statement or an assignment that the burden placed upon it is an undue burden within the meaning of any of the commerce clause cases. It has simply claimed that the clause itself protects it regardless of whether or not it is an actual burden.

THERE IS NO INTERFERENCE WITH THE INDIAN TRIBES OR THEIR RIGHT OF SELF-GOVERNMENT

As the decision of the Arizona Supreme Court points out the tax is not levied against the Indians, but only against those who are engaged in the business of selling within the geographical boundaries of the State of Arizona. The applicability of a state law depends upon whether or not the state action has infringed in any way on the right of reservation Indians to make their own laws and to be ruled by them. *Williams v. Lee,* 358 U.S. 217; *Organized Village of Kake v. Egan,* 369 U.S. 60. The appellant has

pointed out, and it is reiterated in a number of the amici briefs that one of the tribes in the State of Arizona has decided to go into the tax business for itself. The state admires their initiative, but is totally unconcerned with it. The assertion is made that because one tribe has enacted a tax similar to a state tax, that somehow or another this means that the state has interferred with the right of tribal self-government, or discouraged trade with the Indians. The appellees can find no authority for this proposition and none has been cited. It would appear to have about as much logical weight as stating that a state cannot levy a tax on the income of persons because the federal government has drafted an income tax act. Similarly the federal government has enacted a limited area excise tax on the sales of certain items designated as luxuries. Does this preclude the state from enacting a sales tax or a luxury tax of its own? No case has ever held this to be true and no argument has ever seriously been raised to that effect. Multiple taxation may be unfortunate, but it is a fact of life with which all of us live. The average person in the average state pays more taxes than he himself can probably guess or recall. They include state income tax, federal income tax, state property tax, city property tax, county property tax, common school district tax, high school district taxes, junior college taxes, special assessment and improvement tax, irrigation district tax, state sales tax, city sales tax, federal excise tax, unemployment security tax, and old age survivor's and insurance tax. And this horrifying list only applies to the average working man and does not include the multiplicity of taxes that a business man may have to pay by virtue of his business.

In total refutation of this argument this Court has consistently upheld the ability of the state to levy taxes even directly on Indians. *Leahy v. State Treasurer of Oklahoma,* 297 U.S. 420 (Income taxes) and (Inheritance taxes); *Oklahoma Tax Commission v. United States,* 319 U.S. 598.

THE TAX EXEMPTION HEREIN SOUGHT MUST BE CLEARLY EXPRESSED AND NONE CAN BE IMPLIED FROM THE LANGUAGE OF THE CONSTITUTION

Basically appellant's argument is founded on the premise that since Arizona has a privilege tax and this Court has said that a state may not "tax the privilege of engaging in" interstate commerce it therefore cannot tax the privilege of engaging in Indian commerce. This position, tenable as it might appear on first blush, is directly in conflict with the prior holdings of this Court in interpreting the relationship of the United States to its Indian tribes. The only mention of Indian tribes or Indians in the Constitution of the United States (exclusive of the enumeration provisions relative to membership in Congress) is found in Article 1, Section 8, Clause 3. This Court has clearly and consistently and uniformly held in the last one hundred years that the states have all the jurisdiction they could possibly have over Indian land and reservations and the people on them unless the exercise of such jurisdiction would interfere with a federal statute. To be precise:

> "Enactments of the federal government passed to protect and guide its Indian wards only affect the operation, within the colony (or reservation) of such state laws as conflict with the federal enactments. *United States v. McGowan,* 302 U.S. 535."

See also:

> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and to lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie, and her laws, civil and criminal have the same force therein as elsewhere within her limits save that they can have only restricted applications to the Indian wards."

See also, *Thomas v. Gay*, 169 U.S. 264 in which a tax on the cattle of non-Indian lessees' reservation lands was upheld, even though the tax might have an indirect effect on the Indians. See also, *Williams v. Lee*, 358 U.S. 217 in which this Court held that the applicability of a state law depends on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." And again in *New York ex rel Ray v. Martin*, 326 U.S. 496, "In the absence of a limiting treaty obligation or a Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries." And finally, the most recent case, *Organized Village of Kake v. Egan*, 369 U.S. 60, which held that state game and fish laws were applicable to the Indians and reiterated the concept that even where the Department of Interior had attempted to regulate and authorize the use of fish traps by Indians, it could not do so in the absence of a clear Congressional directive and that in the absence of such Congressional enactment state law was prevailing. The *Kake* case, *supra*, again reiterated the concept that unless Congressional enactment blocks states' actions, the states are free to effectuate and enforce their normal laws on Indian reservations dealing even directly with the Indians themselves. In still another case, *British American Oil Producing Co. v. Board of Equalization of Montana*, 299 U.S. 159, this Court had an opportunity to consider the question of a tax imposed by an oil miner on leased Indian lands. The tax was levied upon the gross production of the gas and oil. This, like the situation in the *Gay* case was certainly commerce with the Indian tribes. This Court has specifically held that such a tax was valid.

CONGRESS HAS PROVIDED IN THE BUCK ACT THAT STATE GROSS RECEIPTS TAX MAY BE IMPOSED UPON AN INDIAN TRADER MAKING SALES TO INDIANS WITHIN AN INDIAN RESERVATION

On October 9, 1940, the Congress passed the Buck Act which specifically provided that no person should be relieved from the payment of a "sales or use tax" or from the payment of an "income tax" levied by any duly constituted taxing authority by reason of the fact that the sales, use or transaction giving rise to the income occurred in whole within a federal area. October 9, 1940, 54 Stat. 1059, 4 U.S.C. 105 and 106.

The term "sale or use tax" means any tax measured by "receipts from sales" and the term "income tax" means any tax measured by "gross receipts", Oct. 9, 1940, 54 Stat. 10, 4 U.S.C. 110 (b) and (c).

The term "Federal area" means any lands or premises held or acquired by the United States or any department, estates grant or agency of the United States and also any lands or premises held or acquired for the use of the United States or any department, establishment or agency of the United States. Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C. 110 (e).

The Buck Act was introduced in the House by Congressman Buck as H.R. 6687.

"The purpose of H.R. 6687 is to provide for uniformity in the administration of State sales and use taxes within as well as without Federal areas. It proposes to authorize the levy of State taxes with respect to or measured by sales or purchases of tangible personal property on Federal areas. The taxes would in the vast majority of cases be paid to the State by sellers whose places of business are located off the Federal areas and who make sales of property to be delivered in such areas." House

Report No. 1267, 76th Congress, 1st Session, Vol. 10301—accompanying H.R. 6687.

"This bill passed the House at the first session of the Seventy-sixth Congress and was referred to the Committee on Finance which reported it to the Senate with certain clarifying changes on July 28, 1939. Due to certain objections being raised to the bill by various departments in the executive branch of the Government after the bill had been reported to the Senate, it was recommitted to the Committee on Finance for further study and recommendation. This committee, through a subcommittee composed of Senators George, Brown and LaFollette, held a hearing on April 23, 1940, at which time representatives of the various State taxing authorities appeared in favor of the bill and representatives of the War and Navy Departments and of the Department of the Interior appeared in opposition to certain features of the bill.

Upon completion of the hearings, the subcommittee suggested that a conference be held by the representatives of the state agencies and the Federal agencies with a view to recommending to said subcommittee any proposal or proposals upon which said representatives could agree. Such a conference was held and the proposals which were submitted were used as a point of departure by the subcommittee in drafting the amendment reported by your committee." Senate Report No. 1692, 76th Congress 3rd Session, Vol. 10429—accompanying H.R. 6687.

At the hearing before the subcommittee on April 23, 1940, the problems of taxation on Indian Reservations posed by H.R. 6687 were considered. Senator M. LaFollette proposed an amendment exempting Indian Reservations from provisions of the Bill. (Hearing before a Subcommittee of the Committee on Finance of the United States Senate, Seventy-Sixth Congress, Third Session on H.R. 6687, pages 2 and 6). The assistant solicitor of the Department of Interior testified in favor of the LaFollette amendment. (Hearing before a Subcommittee of the Committee on Finance of

the United States Senate, Seventy-Sixth Congress, Third Session on H.R. 6687, page 37). He introduced a letter from the Acting Secretary of the Interior to the Chairman of the Committee on Finance of the United States Senate recommending a proviso that stated the Act "shall not affect existing law relating to taxation of Indian reservations." (Hearing before a Subcommittee of the Committee of Finance of the United States Senate, Seventy-sixth Congress, Third Session on H.R. 6687, page 39).

The LaFollette Amendment was opposed by Governor Miles of New Mexico. (Hearing before a Subcommittee of the Committee of Finance of the United States Senate, Seventy-sixth Congress, Third Session on H.R. 6687, pages 2 and 18).

As a result of the subcommittee hearing on April 23, 1940, and a further conference between state officials and officials of the United States including the Department of the Interior neither the LaFollette Amendment nor the proviso recommended by the Acting Secretary of the Interior were adopted. Instead the following proviso was adopted:

> "Nothing in sections 103 and 106 of the title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C. 109.

The phrase "Indians not taxed" is found in the XIV Amendment of the United States Constitution. On November 28, 1940, some two months after the Buck Act was passed, the Attorney General, then Robert H. Jackson, stated that it is very doubtful that there are "Indians not taxed" because all Indians are subject to the Federal Income Tax Law. 39 Op. Atty. Gen. 518. Consequently Section 109 would not operate to relieve any Indian from tax liability even if the Court were disposed to interpret the tax in question as a tax upon Indians.

At any rate Section 109 and the testimony of various individuals before the Subcommittee of the Committee on Finance of

the United States Senate conclusively show that Congress intended the term "Federal area" to include Indian Reservations.

Therefore since transactions and sales of personal property to Indians off the reservation would be subject to tax, transactions and sales of personal property to Indians on the reservation are subject to tax.

CONCLUSION

Whatever might be said of the history of the Commerce Clause and whatever the decisions of this Court might be in determining what does or does not constitute an unconstitutional burden on Interstate Commerce by way of state taxation (however such tax may be denominated), it is clear that in dealing with the clause as it affects Indian tribes, this Court has been consistent and clear. It has stated time and time again that a state may act where the federal government has chosen not to act and where the state's act will not necessarily interfere with tribal self-government. This has been true even when economic agreements with the Indians or the tribes or the individuals have been concerned. This has been true even where the Department of the Interior has attempted to act by rule and regulation but has failed to show clear, statutory, Congressional authorization to do so. And while it is true that this precise issue has never been before the Court, the history and tenor of the cases in the Indian field, the cases dealing with federal contractors, and even the cases dealing with interstate commerce have all shown that a state has the right and the power to tax those persons doing business in its borders, unless it is directly contrary to a federal enactment or necessarily a burden. Insofar as Indian tribes are concerned the only burden that has been sustained by the Court is one which interferes or burdens the right of the Indian tribes to their tribal self-government. Since there is no federal statute or not even a federal policy prohibiting or implying that a state may not tax businessmen who happen to be Indian traders (indeed the implications are clearly to the con-

trary) and since there is no burden or barrier to tribal self-government, it is clear that the tax levied herein is proper and that the decision of the Supreme Court of the State of Arizona is correct in law and should be affirmed.

Respectfully submitted,

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